



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Marketing & Management Information, Inc.

File: B-283399.4

Date: May 18, 2000

Ira E. Hoffman, Esq., and Brian T. Scher, Esq., Grayson & Kubli, PC, for the protester.

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DIGEST

Protest that requirement should have been set aside for exclusive small business participation is denied where the contracting officer conducted market research, in response to prior General Accounting Office recommendation for additional investigation of small business capability and interest, which supports reasonableness of his conclusion that the agency could not expect to receive proposals from at least two responsible small business concerns capable of performing the solicitation requirements at a fair market price.

DECISION

Marketing & Management Information, Inc. (MMI) protests the decision by the Defense Commissary Agency (DeCA) to issue request for proposals (RFP) No. DECA01-99-R-0069, for subscription access to an information retrieval database, on an unrestricted basis. MMI primarily challenges the adequacy of market research conducted by DeCA in implementing corrective action recommended in our decision in Marketing & Management Information, Inc., B-283399.2, B-283399.3, Nov. 30, 1999, 99-2 CPD ¶ 105. That decision sustained MMI's protest of the agency's initial market research efforts prior to issuance of the solicitation, which we found to be insufficient to support the agency's determination to conduct the procurement on an unrestricted basis. MMI again contends that the procurement should be set aside for exclusive small business participation.

We deny the protest.

As detailed in our earlier decision, DeCA's grocery commissaries, located worldwide, are generally equipped with cash register equipment with front-end scanners that collect data on specific items sold, including information as to item price and quantity, as well as total revenue from each sale. DeCA's commissary sales data is available to contractors by "subscription agreement" involving the purchase of a 3-year license (at an annual cost of \$700,000) for the use of the raw product movement data. Contracting Officer's Determinations & Findings (D&F), Jan. 28, 2000, at 2.¹ DeCA seeks access to a contractor's information retrieval database containing the agency's product movement sales data for commissaries within the continental United States, as well as comparable sales/movement data from commercial grocery stores within the same geographical areas, so that DeCA personnel can manipulate the data to generate their own category management and product movement reports. Statement of Work at 4.

The RFP, issued July 14, 1999 on an unrestricted basis, contemplated the award of a fixed-price contract for a base period (of approximately 1 year) with an 18-month option period. A synopsis of the requirement was posted on the Commerce Business Daily (CBD) electronic bulletin board (CBD-Net) on August 11; that synopsis remained posted for public access for 30 days. D&F at 3. In response to that advertisement, DeCA received eight requests for a copy of the solicitation; two of those requests were from large businesses and six were from small businesses, including MMI.² Id.

MMI protested the unrestricted nature of the procurement and contended that the procurement should have been set aside for exclusive small business participation. We sustained that protest because of the limited nature of the contracting officer's initial market research, on which the agency relied to support the determination that there was no reasonable expectation of receiving two or more offers from responsible small businesses at fair market prices. That research effort involved only a review of the three current subscribers of the DeCA commissary data (two

¹ Under the subscription agreement, subscribers may place DeCA's commissary data in their firms' databases for use in the production of reports for manufacturers and suppliers of resale products which, for example, track product movement, demand and prices; the subscriber, however, may not sell or release the actual data. Subscription Agreement ¶¶ 5, 6.

² As noted in our prior decision, DeCA did not research the interest or capability of these small businesses as potential offerors under the RFP when their requests for copies of the RFP were received by the agency. As discussed further in this decision, however, DeCA subsequently contacted those firms as part of additional market research efforts undertaken in response to our corrective recommendation in that decision.

large businesses and MMI). Marketing & Management Information, Inc., *supra*, at 3-5. We also found that the contracting officer's determination not to set the procurement aside was based, in part, on his unsupported assumption that a small business could not perform profitably under the contract in light of both the substantial financial outlay required to obtain the necessary data and the existence of established businesses providing similar services. *Id.* at 5-6. We recommended that the contracting officer adequately investigate the potential small business capability and interest in the procurement and determine whether there is a reasonable expectation that offers will be obtained from two responsible small business concerns at fair market prices, and if so, to set aside the requirement for small businesses. *Id.* at 6-7.

MMI again protests the reasonableness of the contracting officer's determination, made subsequent to the additional market research he conducted in implementing our corrective recommendation, that there is no reasonable expectation of receiving offers from at least two responsible small businesses at fair market prices. Protest at 7-8. MMI argues that the additional market research conducted by the contracting officer was insufficient to support the unrestricted basis of the procurement because the agency failed to adequately "solicit" small business interest in the requirement. Protester's Comments at 3-4. We disagree.

Contracting officers generally are required to set aside for small business all procurements exceeding \$100,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. Federal Acquisition Regulation § 19.502-2(b). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. A contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work; our Office will review a protest to determine whether a contracting officer has made such efforts. CardioMetrix, B-271012, May 15, 1996, 96-1 CPD ¶ 227 at 2. A particular method of assessing the availability of small businesses is not required; rather, the assessment must be based on sufficient facts so as to establish its reasonableness. American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3.

The contracting officer reports that in implementing our recommendation for additional market research to assess small business capability and interest in performing the required services, he utilized computerized databases maintained by the Small Business Administration (SBA) for identification of potential small business sources. D&F at 4-5. For example, the contracting officer conducted a search for small business firms registered with the SBA under the Standard Industrial Classification (SIC) code applicable to this procurement--SIC 7375, for information retrieval services. From the numerous sources identified, the contracting officer randomly selected 25 small businesses from which to solicit

information about the firms' interest in and capability to perform the required work at fair market prices; the agency requested information from these firms as to whether they could perform this type of work.³ Id. Five firms responded to the contracting officer's inquiry, which had included a detailed synopsis of the RFP requirements, but none of them reported an interest in and capability to perform the work.⁴ Id. at 5.

The contracting officer also reports that he contacted the five small businesses other than MMI that had responded to the CBD-Net advertisement of the requirement; at the time of the advertisement, each of those firms had requested and had been forwarded a copy of the solicitation. D&F at 5. The contracting officer questioned each of those firms as to its interest in the procurement, and its failure to submit a proposal for award. Three of the firms indicated that the initial expense to obtain the DeCA and commissary data would be prohibitive; one firm provided no

³ MMI questions the contracting officer's solicitation of only 25 firms and suggests that the search criteria (*i.e.*, to target small businesses providing services under SIC 7375) were too broad, since they did not focus on only those firms currently equipped with the electronic data interchange (EDI) capability required under the RFP. The protester, however, has not identified any legal requirement supporting its contention that the market research must be focused only on those firms currently capable of meeting all of a solicitation's requirements; rather, the purpose of the search was to assess the interest and capability of small businesses to provide this type of information retrieval service. Since EDI capability may be obtained by a firm interested in acquiring it, we believe that limiting the search as the protester suggests could have unnecessarily limited the scope of the search of potential sources by excluding those interested in obtaining the EDI capability to perform the requirement.

⁴ MMI speculates that the wording of the contracting officer's synopsis to these small businesses was misleading. First, MMI points out that the synopsis identified a need for additional market research in a procurement under which some proposals had already been received, which MMI contends may have stifled the firms' interest. Protester's Comments at 8-9. To the contrary, we think the synopsis reasonably describes the agency's interest in conducting additional research to identify additional potential competitors for its current RFP and future procurements. Market Research Synopsis at 1. Second, MMI contends that the synopsis was misleading because it provided information to potential offerors about the required annual subscription fee for DeCA data without emphasizing that the offeror need not have the subscription in place at the time of proposal submission. Again, we do not agree with MMI's assessment of the synopsis information--the synopsis provides information about the availability of the commissary data by subscription agreement, but it does not convey that the subscription fee must be paid in order to submit a proposal. Id. at 2.

substantive explanation, having no recollection of the requirement; and the last firm, which had submitted an initial proposal in response to the RFP, did not respond to the contracting officer's requests for an explanation as to why the firm subsequently withdrew from the competition.

The contracting officer then researched the eight firms that had been identified by MMI during the earlier protest proceedings as businesses operating in this industry that have access to, or could obtain, the requisite data.⁵ D&F at 5. The contracting officer reports that five of the firms were found to be large business concerns, and thus were not researched further. Id. at 5-6. The contracting officer further reports that two of the remaining firms were found to specialize in business areas (marketing and engineering/design) different from the services required under the current requirement, and thus were not considered potential sources, and that the last firm listed could not be located due to the limited identification information provided for the firm. Id.

Through his additional market research efforts, the contracting officer received confirmation from several small businesses that the substantial capital outlay necessary for the acquisition of the required data will constrain small business participation in the procurement; no additional potential small business sources were identified. Id. at 6-7. Consequently, the contracting officer reaffirmed his determination that DeCA has no reasonable expectation of receiving at least two offers from responsible small businesses at fair market prices. Id.

We have no basis to question either the reasonableness of the additional market research efforts pursued by the contracting officer or the reasonableness of his determination not to set the requirement aside. Although the protester continues to argue that the contracting officer should have conducted more comprehensive research and more aggressively encouraged small business interest in the procurement, we believe the record of his research and the results of that research provide an adequate basis to support his determination that a set-aside was not warranted here. The record shows that no small business, other than MMI, has indicated any continued interest in competing for the requirement. The contracting officer specifically researched firms identified by MMI as potential sources, questioned the small businesses that had responded to the CBD notice and requested a copy of the solicitation but failed to pursue the contract, and solicited information from 25 small businesses identified by the SBA database under the applicable SIC code--without receiving one additional expression of interest or capability to perform the requirement. Although MMI requests a more exhaustive search to find additional interested small businesses, such additional effort is not required here, since the contracting officer otherwise exercised reasonable efforts to investigate

⁵ In our prior decision, we noted that DeCA had not specifically challenged the capability of these firms.

small business interest and capability to perform the agency's advertised data retrieval requirements. See Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD ¶ 37 at 3-5; Ruchman and Assocs., Inc., B-275956, Apr. 23, 1997, 97-1 CPD ¶ 147 at 2-3 (market research reasonably supported unrestricted basis of procurement where research included questioning an identified potential source and firms that had requested solicitation, but such research failed to locate any additional capable small business for first-time, sizeable procurement); cf. ACCU-Lab Med. Testing, B-270259, Feb. 20, 1996, 96-1 CPD ¶ 106 at 3-4 (where an agency's failure to investigate capability of small businesses that had previously requested solicitation and failure to consult SBA's source databases was held to be unreasonable). As discussed above, that effort failed to identify any additional potential small business offeror or provide any basis for a reasonable expectation that at least two offers would be received from responsible small businesses at fair market prices. Accordingly, the decision not to set the procurement aside was proper.

The protest is denied.

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